KANSAS DIVISION OF WORKERS' COMPENSATION

Annual Seminar

Appellate Case Review
October 2, 2012

This outline addresses Kansas appellate cases decided during the past year. With one exception, these cases are determinative of issues litigated under the Kansas Workers' Compensation Act for statues in effect prior to May 15, 2011.

I. *Tina C. Raush v. Sears Roebuck & Co. and Indemnity Insurance Co.* 46 Kan.App.2d 338, 262 P.2d 194 (2011)

The *Raush* matter is instructive on the appellate standards for review of Board decisions and will impact the manner in which the court addresses factual disputes.

Facts: Claimant was employed by Sears to load and unload merchandise. In late 2007, she reported problems with both shoulders to her supervisors, although it is disputed whether she related the problems as being work related. Raush was moved to an accommodated position which reduced her symptoms, but she claimed to have chronic issues.

Four to five months after the injury, Raush was terminated for cause and reportedly stated Sears "would pay for this in a lawsuit."

The ALJ determined Raush sustained work related injuries, that she had provided adequate notice to Sears and granted compensation.

The Board reversed the ALJ and held Raush did not meet her burden of proof to establish a permanent injury. Among the findings by the Board, it said:

a. Claimant had prior claim experience and was aware of appropriate claims procedures.

b. Claimant initially sought treatment on her own.

c. respondent denied receiving notice of a work-related injury.

d. claimant's restrictions were accommodated and yet she claimed her condition did not worsen. Claimant later asserted her condition did worsen. The claim, as presented asserted continuing aggravations through claimant's last day worked in March 2008.

Claimant appealed the Board's denial of benefits to the Kansas Court of Appeals. The appellate court then engaged in an extensive discussion on the 2009 amendments to K.S.A. 77-621(c)(7) dealing with the scope of review.

The *Raush* decision clearly states that the appellate court will continue to examine or review the agency's factual findings to determine whether or not they are supported by competent evidence. However, the 2009 amendments also provide that:

a. The court must review both supporting and contradictory findings; and

b. the court will review the presiding officer's determination on credibility, if any; and

c. the court will review the agency's explanation as to why the evidence supports its findings.

In discussing the scope of review, the Court cited K.S.A. 77-621 (d)

> (d) For purposes of this section, "in light of the record as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. In reviewing the

> evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.

The court determined that K.S.A. 2010 Supp. 77-621(c) did not apply to the Board review, but rather the court's review of the Board findings and conclusions.

When considering the adequacy of all the evidence both for and against compensability, the appellate court affirmed the Board' denial of compensation.

The Board's jurisdiction is established in K.S.A. 44-555c(a) which provides:

> (a) There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge. The board shall be within the division of workers compensation of the department of labor and all budgeting, personnel, purchasing and related management functions of the board shall be administered under the supervision and direction of the secretary of labor. The board shall consist of five members who shall be appointed by the secretary in accordance with this section and who shall each serve for a term of four years, except as provided for the first members appointed to the board under subsection (f).

Essentially, the Board conducts a de novo review of the facts and law and makes it determination in the same fashion as the administrative law judge. It has the power to grant or deny compensation based upon the record.

The Board's determination is then subject to review in accordance with K.S.A. 77-621 and at that point, the appellate court reviews the evidence cited by any party to determine if:

a. The findings are supported by competent evidence.

b. there were determinations of veracity.

c. the agency explanation for its findings are supported.

Ironically, you will note K.S.A. 77-621(d) concludes with this sentence: "In reviewing the evidence in light of the record, the court shall not re weigh the evidence or engage in de novo review."

The last sentence of the statute appears to be contradictory with the preceding paragraph. The appellate court is actually re weighing the evidence which supports and contradicts the factual findings of agency.

The ALJ found it was more probably true than not claimant suffered a compensable injury, in spite of conflicting evidence. No specific finding was made on claimant's veracity, so the Court termed the claimant's veracity "implied veracity" as opposed to "expressed veracity."

The court suggests the Board should accord less weight to an implied veracity determination than one which is clearly expressed by the finder of fact. While not making a specific determination, the Court stated: "In fact, it appears that the amended statute may require consideration of only an express determination of veracity."

In matters where the ALJ and Board reach the same or similar conclusions, the appellate court seems likely to affirm the Board's decision. However, when the findings of the Board are different than the ALJ and there is no expressions by the ALJ on veracity, it seems the court is willing to re weigh the evidence under greater scrutiny.

II *Deborah Chriestenson v. Russell Stover Candies and Hartford Accident and Indemnity*, 46 Kan. App.2d 453, 262 P.3d 821 (2011)

Claimant asserted a chemical exposure to multiple chemicals. The exposure was alleged to have occurred over 20 months of an eleven year period of employment.

Claimant's records supported she had some problems with chemical sensitivity from carpeting installed in her home prior to her employment at respondent's facility. After commencing employment, claimant suffered a number of ailments which caused her family physician to place her on Dilantin.

Claimant alleged she was exposed to fumes from bleach, pesticides, engine exhaust, paint, and anhydrous ammonia at the plant. She claimed her final exposure was on December 8, 1998 when fumes permeated her office.

Claimant was terminated on December 18, 1998 and she immediately filed her claim for compensation. The ALJ found claimant suffered a temporary aggravation of her condition and denied permanency. The Board reversed and on a 3-2 decision, granted claimant permanent and total disability.

The dissent suggested claimant was not entitled to permanency as she failed to prove there was a causal connection between her work exposures and her permanent disability.

It appears claimant's expert opined her work exposure was directly responsible for her difficulty. However, the doctor admitted claimant's past medical records had not been reviewed and that her smoking was not considered to be important.

Respondent's expert apparently had all of claimant's records available, opined her smoking was a substantial factor. Further, they were concerned claimant's expert did not evaluate her until eight years after her employment with respondent ended.

The standard for review in this matter was the same as for the Raush matter discussed above.

Based on a number of factual questions answered adverse to claimant, the Court of Appeals reversed the Board and denied compensation. It appears the court was suspect of the opinions of claimant's expert on linking the present problems with her exposure years before. The court held that when the salient question is the cause of the medical condition, "the maxim of post hoc, ergo propter hoc: the symptoms follow the exposure, therefore, they must be due to it" is not competent evidence. See *Kuxhausen v. Tillman Partners*, 40 Kan.App2d 944, 197 P.3d 859 (2009)

Apparently, the claimant's expert had been involved in other reported litigation in which opinions were excluded as not having support in scientific journals. The Kansas court adopted some language from a federal decision which

suggests "the ability to diagnose medical conditions is not remotely the same....as the ability to deduce, delineate, and describe, in a scientifically reliable manner, the causes of those conditions."

Our appellate court focused on the testimony of claimant's expert since the Board admittedly relied on it. There appears to be insufficient evidence produced about the quantity and other specifics concerning the exposure. The court seems to imply the basis for causally relating claimant's problems to her work were not sufficiently proven.

The matter was remanded to the Board for reconsideration and to determine the amount of workers compensation benefits claimant may be entitled to as a result of any aggravation of her preexisting chemical sensitivity while employed at respondent's facility.

III *Roy D. Craig v. Val Energy and Liberty Mutual Insurance Co. of North America,* 47 Kan. App.2d 164, 274 P.3d 650 (2012)

This matter revolves around the inherent travel exception to the going and coming rule.

Claimant was a driller for respondent and had supervisory responsibility for his own crew. He picked up each member of his crew and drove them to various drilling sites, using his personal vehicle for transportation. Claimant was reimbursed for mileage in transporting himself and the crew.

In July 2007, claimant picked up his son, a crew member, and proceeded to work at a temporary position as designated by his employer. While returning home, claimant was involved in a one vehicle accident and sustained injuries.

The ALJ denied compensation on the basis the injury did not arise out and in the course of clamant's employment because his injury was not covered by the exceptions to the going and coming rule found in K.S.A. 44-2010 Supp. 44-508(f). The ALJ then reasoned that since the inherent travel exception was a creature of common law, the decision in *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009) rendered the exception invalid. In other words, there was no expressed statutory language supporting the exception and a strict construction would preclude granting compensation for the inherent travel

exception.

Our appellate court cited *Messenger v. Sage Drilling Co.,* 9 Kan. App.2d 435, 680 P.2d 556 for the proposition that when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of the employer the going and coming rule does not apply.

The court further relied on *Halford v. Nowak Construction Co.,* 39 Kan. App. 2d 935, 186 P. 3d 206:

> The "work-related errand" or "special purpose trip" exception to the "going and coming rule" applies where traveling is required in order to complete some special work-related errand or special purpose trip in the scope of the employment. See, *e.g.*, *Mendoza v. DCS Sanitation*, 37 Kan.App.2d 346, 152 P.3d 1270 (2007) (claimant's trip to off-work site location to pick up paycheck compensable as work-related errand); see, *e.g.*, *Ridnour v. Kenneth R. Johnson, Inc.*, 34 Kan.App.2d 720, 727, 124 P.3d 87 (2005), *rev. denied* 281 Kan. 1378 (2006) (injury to a worker driving home in order to pick up keys so he could let his coworkers into a worksite was compensable); *Brobst v. Brighton Place North*, 24 Kan.App.2d 766, 774–75, 955 P.2d 1315 (1997) (injury sustained in parking lot after attending a continuing education seminar was compensable).
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> As emphasized by our court in *Mendoza* and *Brobst*, this exception extends to the normal risks involved in completing the task or travel, and the required perspective is to view the task or trip as unitary or indivisible, meaning an injury during any aspect thereof is compensable. See *Blair v. Shaw*, 171 Kan. 524, 528, 233 P.2d 731 (1951) (entire trip by mechanics from annual certification test was integral to employment, causing deaths during trip to be compensable). So long as the employee's trip or task is an integral or necessary part of the employment, this exception applies to assure compensability for an injury suffered during any portion of such trip or task. See *Kindel*, 258 Kan. at 277, 899 P.2d 1058.
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> Applying the special work-related errand exception, Halford's

> accident occurred as a part of his special trip on the morning in question to the "yard" to pick up materials or supplies for the day's work and must be compensable for this reason as well.

In *Craig*, the employment duties had commenced when he commenced his trip and therefore, there was no need to consider the statutorily created exceptions to the going and coming rule.

The determination on whether an employee's duties may fall within the inherent travel exception is a factual issue to be considered on a case by case basis. *Messenger*, supra.

The court examined the facts which led to the finding that claimant's travel was inherent in his work:

a. Commuting long distances was required in the job itself; and
b. The employer sought employees who would be willing to work at remote sites; and
c. It was customary for the driller to receive pay for driving, acquiring a crew and providing that crew with transportation; and
d. The employer derived benefit from the transportation agreement; and
e. The worker was reimbursed for costs.

The court distinguished the holding in *Butera v. Flour Daniel Construction Co.* 28 Kan. App. 2d 542, 18 P. 3d 278 where travel was involved. In that matter, claimant initially traveled great distance and the employer paid his expenses. Later, the arrangement changed, claimant moved his temporary residence close to his work and his motel and travel were no longer reimbursed.

The factual findings in this matter were determined to be analogous to *Messenger* and therefore compensable.

IV Debra K. Welty v. USD 259, Docket No. 106,383 (unpublished as of August 20, 2012)

This matter addressed the issue whether K.S.A. 2006 Supp. 44-523(f) requiring a trial within five years from the date of application for hearing.

Claimant injured her left knee on September 3, 2003. She had surgery, but developed right knee problems and had surgery in June 2008.

The application for hearing was filed on April 21, 2004. When the matter went to trial April 8, 2010, respondent requested the matter be dismissed for failure to try the matter within five years.

The ALJ and the Board found K.S.A. 2006 Supp. 44-523 to be prospective in nature and that even if the statute was to be applied retroactively, claimant did not have reasonable time after enactment of the statute to seek a final hearing.

The court cited *Bryant v. Midwest Staff Solutions, Inc.* 292 Kan. 585, 257 P. 3d 255 which holds that as a general rule, a statute operates prospectively in the absence of clear statutory language that it should be applied retroactively. The court held vested rights cannot be invalidated retroactively as that would violate a claimant's constitutional rights.

This case was not designated for publication. At the time this outline was prepared and submitted to the Division of Workers Compensation, the time limit for requesting Supreme Court review had not expired. Counsel for claimant suggested a Motion to Publish was being strongly considered.

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